STATE OF MICHIGAN
SUPREME COURT

ALLY FINANCIAL, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154668 Court of Appeals No. 327815 Court of Claims No. 13-000049-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154669 Court of Appeals No. 327832 Court of Claims No. 13-000114-MT
SANTANDER CONSUMER USA, INC., Plaintiff/Appellant, v. STATE TREASURER, STATE OF MICHIGAN and DEPARTMENT OF TREASURY, Defendants/Appellees.	Supreme Court No. 154670 Court of Appeals No. 327833 Court of Claims No. 13-000113-MT

ALLY FINANCIAL INC. AND SANTANDER CONSUMER USA, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

On June 9, 2017, this Court issued an order informing the parties that the Appellants' application for leave to appeal will be further considered. The order directed the parties to file supplemental briefs addressing four issues:

> (1) whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property;
>
> (2) whether the Court of Appeals erred in giving the Department of Treasury's interpretation of MCL 205.54i respectful consideration in light of MCL 24.232(5);
>
> (3) how this Court should review the Department's decision to require RD-108 forms pursuant to MCL 205.54i and, under that standard, whether the decision was appropriate; and
>
> (4) whether the Court of Appeals erred in holding that Ally Financial's election forms did not apply to accounts written off prior to the retailers' execution of the forms.

Finally, the order made clear that the supplemental brief should contain new arguments on each of the four issues. The Court cautioned the parties not to merely restate the positions taken in the application papers.

I. MCL 205.54i PROHIBITS FULL REFUNDS FOR BAD DEBT ACCOUNTS THAT INCLUDE REPOSSESSED PROPERTY

MCL 205.54i only precludes *full* refunds for defaulted accounts that include repossessed property. *Partial* refunds for bad debt accounts are permitted under MCL 205.54i after reduction for the value of the repossessed property. With one exception,[1] every other state having a similar statutory provision interprets the exclusion for repossessed property consistent with the

[1] Appellants' Application for Leave to Appeal at pp. 16-22. In the Appellees' Brief in Opposition, the Department cites to Ark. Admin. Code 006.05.212-GR-18(J)(5) and claims that Arkansas has an identical exclusion for repossessed property. However, the Department has provided no evidence – for example, a public notice to taxpayers, a published ruling, or a decided case – that the Arkansas Department of Revenue applies its regulation consistent with the approach taken by the Department in this case.

Appellants' position in this case.[2] Michigan courts are routinely guided by interpretations of law from other jurisdictions in cases of first impression. *See, e.g., Glass v Goeckel*, 473 Mich 667, 674 n. 4 (2005) ("We refer to a similarly situated sister state … for a credible definition of a term long employed in our jurisprudence."); *Dep't of Civil Rights v Gen Motors Corp*, 412 Mich 610, 646 (1982) ("while we are certainly not controlled by such case law from other jurisdictions, we can be guided by it when it is determined to be appropriate and sound"). It is both appropriate and sound in this case to look to other states for direction with respect to the use of the term "repossessed property" within MCL 205.54i.

The Department's treatment of repossessions for purposes of MCL 205.54i is logically inconsistent considering the statute as a whole and is at odds with legislative intent. This Court has made clear that, when interpreting a statute, a court must "ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312 (2002). This is accomplished by considering "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1996), quoting *Bailey v United States*, 516 US 137, 145 (1995). Important to the critical issue in dispute in this case, this Court has stated that "a statute must be read as a whole [with] individual words and phrases [being] read in the context of the entire legislative scheme." *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 528 (2012) (citations omitted).

[2] There are six states – Nebraska, North Dakota, Ohio, Tennessee, Washington and Wisconsin – that have identical statutory exclusions for repossessed property. Each of these states agrees with the Appellants' interpretation that the value of repossessed property merely reduces a bad debt claim. See Appellants' Application for Leave to Appeal at pp. 16-22.

There is an undisputable logic to the statutory language of MCL 205.54i. This Court can "reasonably infer" from this logic the legislative intent supporting its enactment. MCL 205.54i reads in pertinent part as follows:

> (1) As used in this section:
>
> (a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

MCL 205.54i(1)(a) is comprised of just two sentences. The first sentence defines what qualifies as a "bad debt." The legislature is clear that a debt becomes a "bad debt" only if the taxpayer is eligible to claim a deduction for the debt under 26 USC 166. A debt is a "bad debt" under Michigan law if it qualifies as a "bad debt" under federal law. However, unlike qualifying bad debts under 26 USC 166, certain adjustments need to be made to the "bad debt" to reflect the application of Michigan law.

Therefore, the second sentence of MCL 205.54i(1)(a) explains the items that are to be excluded from a "bad debt." There are a total of seven exclusions. Parsing the words of this second sentence, it is properly read as follows:

> A bad debt shall not include any:
>
> (1) finance charge,
>
> (2) interest,
>
> (3) sales tax on the purchase price,

(4) uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid,

(5) expenses incurred in attempting to collect any account receivable or any portion of the debt recovered,

(6) accounts receivable that have been sold to and remain in the possession of a third party for collection, and

(7) repossessed property.

The legislative intent is clear from the words used in this second sentence. The phrase "shall not include any" leaves no room for interpretation. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135 (1996) (where the language of the statute is unambiguous, the legislature must have intended the meaning clearly expressed, and the statute must be enforced as written). The first sentence of MCL 205.54i defines a "bad debt" by reference to federal law. In the second sentence, the legislature uses "shall not include any" to reduce the gross amount of the bad debt to reflect certain modifications uniquely tied to the origin of the bad debt – the retail sale in Michigan.[3]

The Appellants contend that all of the adjustments outlined in the second sentence of MCL 205.54i(1)(a), with the obvious exception of (6), are quantified – or valued – in dollars. Under the Appellants' interpretation of MCL 205.54i(1)(a), the second sentence reads as follows:

A bad debt shall not include:

(1) *the amount of any* finance charge,

(2) *the amount of any* interest,

(3) *the amount of any* sales tax on the purchase price,

[3] This approach is conceptually similar to the method by which the Department instructs taxpayers to arrive at income subject to tax under the Michigan corporate income tax. The starting point is the federal taxable income of the taxpayer. MCL 206.607(1). This tax base is then modified based on Michigan-specific adjustments. See MCL 206.623(2)-(5).

(4) uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid,

(5) *the amount of any* expenses incurred in attempting to collect any account receivable or any portion of the debt recovered,

(6) accounts receivable that have been sold to and remain in the possession of a third party for collection, and

(7) *the value of any* repossessed property.

The Appellants' interpretation should be noncontroversial. The adjustments outlined by the legislature in the second sentence of MCL 205.54i are intended to limit the amount of a "bad debt" to that portion of the debt for which (a) the taxpayer collected and remitted tax to the Department and (b) has suffered an economic loss. Appellants' inclusion of the italicized language merely highlights this legislative purpose.

The Department's interpretation of MCL 205.54i must be rejected because it is logically inconsistent in the context of the full statutory language. Specifically, the Department contends that if a "bad debt" is in any way tied to repossessed property – no matter the value of the repossessed property[4] – no "bad debt" exists for purposes of MCL 205.54i. The flaw in the Department's "binary" approach to defining bad debts for repossessed property is evident when considering the statute as a whole.

Consider the adjustments required by MCL 205.54i for finance charges. MCL 205.54i provides that "[a] bad debt shall not include any finance charge[.]" The legislature used the same grammatical structure when addressing the impact of repossessed property. MCL 205.54i states that "[a] bad debt shall not include any … repossessed property." Under the Department's interpretation of MCL 205.54i, the presence of repossessed property summarily nullifies a claim

[4] The Department's interpretation of repossessed property runs contrary to legislature's intent to define "bad debts" in terms of economic loss. This argument has been fully briefed by the Appellants and will not be repeated here. Appellants' Application for Leave to Appeal at pp. 13-16.

for bad debt where the account includes repossessed property. Applying this approach to the adjustment for finance charges in MCL 205.54i, no relief for bad debts is available for any account that includes a finance charge. This construction of the statute excludes *all* accounts as *all* accounts include finance charges.

More perplexing is the extension of the Department's logic to the adjustment required for sales tax. Using the Department's "binary" approach, no bad debt can include "any sales tax on the purchase price." In other words, applying the Department's interpretation, the taxpayer will not have a claim for the account where sales tax was charged on the retail sale. The absurdity of such a result speaks for itself. *Attorney General v Detroit U Ry*, 210 Mich 227, 257 (1920) (statute must be construed to avoid an absurd result). Under the Department's reading, no claim for overpayment of sales tax can be made on *any* account.

The Department's treatment of repossessed property in MCL 205.54i cannot be examined in isolation. The Department's proposed interpretation of the statutory language must be harmonized with the remainder of the statute. Harmony cannot be achieved in this case, however. The Department's position is unsound and at odds with legislative intent. The legislature, as it did with the quantification of the exclusion for finance charges, interest, sales taxes and collection expenses, intended only that the *value* of the repossessed property be used to adjust the amount of the bad debt under MCL 205.54i. The Appellants' construction of MCL 205.54i is both logical and consistent with intent of the legislature.

For these reasons, the Appellants maintain that the correct reading of MCL 205.54i is to only deny full refunds for bad debt accounts that include repossessed property.

II. THE COURT OF APPEALS ERRED BY GIVING "RESPECTFUL CONSIDERATION" TO THE DEPARTMENT'S INTERPRETATION OF MCL 205.54i

A critical issue in any case involving statutory construction is the degree of deference given to a state taxing authority. In this case, relying in part on *In re Complaint of Rovas*, 482 Mich 90 (2008), the Court of Appeals gave "respectful consideration" to the Department's interpretation of MCL 205.54i. The Court of Appeals erred, however, by failing to consider the controlling standard outlined in MCL 24.232(5).[5]

MCL 24.232 places controls and limitations on the rule-making authority of state agencies. MCL 24.232 plays a critical role by explaining when an agency action has the force and effect of law. As it relates to this case, MCL 24.232(5) states:

> A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and shall not be given the force and effect of law. An agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review. A court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act.

The source of the Department's historic interpretation of MCL 205.54i is Revenue Administrative Bulletin (RAB) 1989-61. As recounted by the Court of Appeals, the Department denied the Appellants' claims for refunds under MCL 205.54i solely based on the explanatory statements contained in RAB 1989-61.[6]

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[5] The Court of Appeals supported its holding by granting "respectful consideration" to the Department's interpretation and relying on its unpublished decision in *DaimlerChrysler Services of North America, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 2010 (Docket No. 288347). However, as later noted by the Court of Appeals, the *DaimlerChrysler* court also relied on the Department's historic interpretation of MCL 205.54i.

[6] In support of the denial of refunds the Department cited RAB 1989-61 and *DaimlerChrysler*. However, the court in *DaimlerChrysler* based its holding on RAB 1989-61.

RAB 1989-61 is a "bulletin" for purposes of MCL 24.232(5). The full title of the item is Revenue Administrative *Bulletin* 1989-61. MCL 24.232(5) is clear that a bulletin cannot be enforced by an agency and does not have the force and effect of law. The content of a bulletin is merely advisory. More problematic in the context of this case, the statute provides that the Department "shall not rely upon a … bulletin … to support the [Department's] decision … if that decision is subject to judicial review." The Department acted in clear violation of MCL 24.232(5) in this case by relying on RAB 1989-61 in order to secure "respectful consideration" by the Court of Appeals. In its Brief in Opposition filed with this Court, the Department looks again to RAB 1989-61 for support.[7] The plain language of MCL 24.232(5) prevents the Department from relying on its own bulletin where the resulting agency action – the denial of bad debt refunds – is subject to judicial review. The Department acted in violation of MCL 24.232(5) by relying on RAB 1989-61 in the Court of Claims, on appeal to the Court of Appeals and again in its Brief in Opposition filed with this Court.

MCL 24.232 prevents a state agency, such as the Department, from avoiding the strictures of the Michigan Administrative Procedures Act and treating certain forms of agency action as if they had the force and effect of law. In so doing, this statute provides an important public service to Michigan residents. A violation of law can result in fines, penalties, and loss of personal freedom. The severity of these consequences requires and demands a "bright-line" rule for determining when agency action has the force and effect of law. MCL 24.232(5) provides such a "bright-line" rule. The Department must be required to follow the clear language of MCL 24.232(5).

The doctrine of "respectful consideration" applies only when the agency position is consistent, reasonable, and longstanding. When the agency position is clearly inconsistent with

[7] Appellees' Brief in Opposition at pp. 18-20.

the governing statute, it is not entitled to deference. This is especially true in this case where the Department is using the doctrine to contradict the clear intent of the legislature. If the Department prevails based on its reliance on RAB 1989-61 in this case, it could use "respectful consideration" to justify virtually any position.

Not only did the Department act in direct contravention of the unambiguous language of MCL 24.232(5), the Court of Appeals also failed to comply with the statute. MCL 24.232(5) states that "[a] court shall not rely upon a … bulletin … to uphold an agency decision to act or refuse to act." In this case, the Court of Appeals gave "respectful consideration" to the Department's construction of MCL 205.54i and adopted the reasoning of the Court of Claims. The Court of Claims based its decision on RAB 1989-61 and the holding in *DaimlerChrysler*. However, the Court of Appeals was clear in *DaimlerChrysler* that its decision was premised solely on RAB 1989-61. It follows, therefore, that the linchpin for each of these decisions interpreting MCL 205.54i is RAB 1989-61. Without RAB 1989-61, there is no basis for the decision in *DaimlerChrysler* or in this case.

MCL 24.232(5) mandates that Michigan courts *shall* not rely on an agency bulletin to uphold an agency action or inaction. Without RAB 1989-61, there is no basis for the holdings in *DaimlerChrysler* or this case. The Court of Appeals did not follow the clear instruction of MCL 24.232(5) and, as a result, committed clear error in this case.

III. THE DEPARTMENT'S DECISION TO REQUIRE RD-108 FORMS DOES NOT WITHSTAND SCRUTINY UNDER THE APPLICABLE STANDARD OF REVIEW

MCL 205.54i(4) provides that "[a]ny claim for a bad debt deduction under this section shall be supported by that evidence required by the department." This sentence provides the Department with discretionary authority to determine the support needed to substantiate a claim

for bad debts. However, as with any statute vesting authority in a state agency, the state agency must exercise its discretion in a reasonable manner.

Pursuant to this legislative grant of authority, the Department required that the Appellants provide validated RD-108 forms to support the claims for bad debt refunds under MCL 205.54i. According to the Department, validated RD-108 forms are necessary to prove that sales tax was paid on the underlying retail sale transactions. The Court of Appeals agreed, despite protestations from the Appellants that proof of sales tax paid can be demonstrated by, *inter alia*, the fact that certificates of title were issued for the purchased vehicles.[8]

In its Brief in Opposition, the Department claimed that its decision to require validated RD-108 forms was a "policy determination" and made within the "exercise of its discretionary authority."[9] Yet, the authority given to the Department by the legislature is not without limits. The courts of Michigan are clear on this point.

The Department's "policy determination" mandating the production of validated RD-108 forms is reviewable under an arbitrary and capricious standard. *See Bundo v City of Walled Lake*, 395 Mich 679, 703 (1976). The Department's actions must also be consistent with the legislative intent supporting MCL 205.54i. *See Luttrell v Dep't of Corrections*, 421 Mich 93, 100 (1984). In this case, the Department's decision to require validated RD-108 forms is arbitrary, capricious, and contrary to legislative intent.

This Court has defined the terms "arbitrary" and "capricious" according to their common usage. An agency action is "arbitrary" if it is "[w]ithout adequate principle … Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance,…decisive but unreasoned." *Bundo*, 395 Mich at

[8] *See* MCL 257.815(2).

[9] *See* Appellees' Brief in Opposition at pp. 25-26.

703 fn. 17, citing *United States v Carmack*, 329 US 230, 243 (1946). The term "capricious" means "[a]pt to change suddenly; freakish; whimsical; humorsome." *Id*.

The Department acted arbitrarily in this case because its decision to require validated RD-108 forms was "without consideration or adjustment with reference to principles, circumstances, or significance." It is certainly understandable that the Department should require a taxpayer to provide documented support for a refund claim filed under MCL 205.54i. However, as a matter of sound tax policy, the information requested should be in the possession or control of the taxpayer.

In this case, the RD-108 forms are prepared and filed by *third parties* – not the Appellants. The Appellants have no control, and the Department has not alleged that such control exists, over the recordkeeping efforts of third parties. The Appellants cannot force these third parties to acknowledge a request for validated RD-108 forms much less compel them to retrieve and send copies of the forms to the Appellants. Making matters worse is the fact that the Department has been steadfast in refusing to accept *any* other method of proving that sales tax was paid.

In support of their refund claims, the Appellants provided copies of each and every installment sale contract evidencing the retail sale of the motor vehicles. The installment sale contracts showed the amount of sales tax charged and collected for each sale that was remitted to the Department. The Department refused to accept the contracts as proof of sales tax paid, but, interestingly, never asserted that the sellers failed to pay tax on these sales. The Department's actions in this regard are arbitrary because they are "without consideration or adjustment with reference to principles, circumstances, or significance."

Proof of tax paid can be demonstrated without the need to seek documentation from third parties. As a matter of Michigan law, no certificate of title can be issued by the Michigan Department of Motor Vehicles unless sales tax was paid on the purchase of the vehicle. MCL 257.815(2). Each and every vehicle that is the subject of the Appellants' refund claims was issued a certificate of title. The Department does not dispute this point. It stands to reason, therefore, that the Appellants have conclusively shown that all sales tax was paid on the financed transactions. The Department's failure to acknowledge this proof of payment of sales tax is further evidence of its arbitrary action.

The Department's "policy determination" is also inconsistent with legislative intent. The legislature clearly enacted MCL 205.54i with the goal of providing an efficient means of claiming relief from bad debts. The requirement that the Appellants pursue records from independent third parties (in this case, the State) – and only that documentation can support the claim – erects artificial barriers to the claimed relief. Turning a "blind eye" to the indisputable conclusion drawn from the issuance of certificates of title also creates an obstacle to bad debt refunds not intended by the legislature. The failure to act in accordance with legislative intent demonstrates that the Department's "policy determination" requiring the Appellants provide validated RD-108 forms to support their claims to refunds under MCL 205.54i is contrary to law.

The Court of Appeals erred by failing to hold that the Department's actions were arbitrary and contrary to law.

IV. THE COURT OF APPEALS ERRED IN HOLDING ALLY'S ELECTION FORMS DID NOT APPLY TO ACCOUNTS WRITTEN OFF PRIOR TO THE RETAILERS' EXECUTION OF THE FORMS

In financing transactions such as those at issue in this case, the legislature required that a joint election be executed to designate the proper party to claim relief from bad debts. The relevant statutory provision provides:

> (3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:
>
> (a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.
>
> (b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

MCL 205.54i(3). Despite the fact that under MCL 205.54i(4) the legislature expressly authorized the Department to determine the evidence required to support a claim for bad debt refunds, the Department has never issued guidance to taxpayers regarding when a written election is deemed to satisfy MCL 205.54i(3). In fact, the Department never announced its "policy" on the timing of the execution of the election forms until after all of the accounts in this case had been charged off. The obvious timing requirement in the statute, and the sole requirement, is that the claimant possess an election form before obtaining the tax refund so that the Department knows which party to pay.

Ally provided the Department with executed election forms demonstrating its entitlement to claims for bad debt refunds under MCL 205.54i. The Department refused to accept the joint election forms because they were executed after Ally charged off the accounts in its books and records. According to the Department, at the time the joint election forms were executed the defaulted accounts no longer existed – *i.e.*, they were charged off. The Court of Appeals agreed with the Department's argument and held that Ally's joint election forms failed to support its bad debt refund claim.

The Court of Appeals erred because there is no time component to the execution of a "written election" as provided by MCL 205.54i(3). The legislature did not specify when a joint

election form must be executed to be effective for purposes of MCL 205.54i. The legislative intent is clear from the express language of MCL 205.54i(3). When interpreting statutes, Michigan courts must "ascertain and give effect to the intent of the Legislature." *People v Koonce*, 466 Mich 515, 518 (2002). Where, as here, the statutory language is unambiguous, the court gives effect to its plain meaning. *Ter Beek v City of Wyoming*, 495 Mich 1, 8 (2014). In such cases, it is presumed that the legislature intended the meaning expressed. *Aspey v Mem Hosp*, 477 Mich 120, 127 (2001). MCL 205.54i(3) does not impose a timing requirement for the execution of the required joint election form. If the legislature had intended to impose such a requirement, it most certainly knew how to do so. *In re MCI Telecommunications*, 460 Mich 396, 411 (1999) (court should not expand an unambiguous statute to address issues not intended by the legislature). This Court should not accept the Department's invitation to graft additional requirements on the statutory scheme.

The purpose of requiring a joint election form is to make certain that only one party is claiming a refund of the sales tax. Without the use of a joint election form, there is a risk that both parties could present bad debt refund claims to the Department. The written election is, therefore, meant to safeguard the Department from competing claims for bad debt refunds on the same account(s). It is for this reason that MCL 205.54i(3) does not contain a time component. The timing of the execution of the written election is wholly irrelevant to the unambiguous purpose of written election requirement. The legislature intended the Department to employ MCL 205.54i as a "shield" and not a "sword" to defeat otherwise valid claims for relief from bad debts.

The Department's position must also be rejected because it misunderstands the legal effect of the election forms. Ally's joint election forms are invalid, according the Department,

because the subject accounts had been charged off at the time that the forms were executed. However, the legal effect of the written elections is an *assignment of a right* to claim refunds under MCL 205.54i. For purposes of the adequacy of the joint election forms, all that matters is that at the assignor – here, the retailer – had the right to claim a bad debt refund for the defaulted accounts. If the retailer was eligible to claim bad debt refunds, the joint elections used by Ally satisfied the legislative purpose of MCL 205.54i(3).

During the years at issue, Ally used two different form types for written elections.[10] The language of both forms was tailored to comply with MCL 205.54i(3). MCL 205.54i contains four distinct requirements:

> (1) The written election must designate which party is claiming the deduction;
>
> (2) The sales tax must have been previously reported and paid;
>
> (3) Neither party must have previously deducted or received a refund on any portion of the accounts receivable; and
>
> (4) All accounts receivable must have been found worthless and written off by the taxpayer who made the sale or the lender on or after September 30, 2009.

Each of the type of form used by Ally qualified as a "written election" under MCL 205.54i(3). Both forms made clear that Ally, and not the retailer, would be entitled to claim relief under MCL 205.54i. In both forms of written election, the retailer expressly states that it "has not and will not claim a deduction or refund under MCL 205.54i with respect to any Accounts currently existing or created in the future[.]" Finally, the language of both form types confirms that only accounts charged off after September 30, 2009 are covered by the written election.[11] The joint

[10] The exact language used for each of the form types is referenced in Appellants' Application for Leave to Appeal at pp. 32-33.

[11] The requirement that all sales tax must have been reported and paid is proven outside the four corners of the written election.

elections drafted and used by Ally – and provided to the Department –satisfy the "written election" requirement of MCL 205.54i(3).

The Court of Appeals erred by adopting the Department's interpretation of Ally's joint election forms. The legislative purpose of MCL 205.54i(3) was to assist the Department in the event of competing claims for refund of sales taxes on the same defaulted accounts. The timing of execution is irrelevant insofar as the both the retailer and the lender were eligible to claim bad debt refunds under MCL 205.54i. The Department's time-focused interpretation of MCL 205.54i(3) must be rejected as a matter of law.

Respectfully submitted,

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July 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I electronically filed the ***Ally Financial, Inc. and Santander Consumer USA, Inc.'s Supplemental Brief in Support of Application for Leave to Appeal and this Certificate of Service*** with the Clerk of the Court using the TrueFiling System which will send notification to all counsel registered electronically.

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